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March 10, 2008

VIA E-MAIL TO DRIDDLE@WATERBOARDS.CA.GOV

Dianne Riddle  
Staff Environmental Scientist  
Hearings and Special Programs Section  
Division of Water Rights  
P.O. Box 2000  
Sacramento, CA 95812-2000

Re: Bay-Delta Strategic Workplan Workshop Comments

On behalf of the County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District (collectively "County ") we respectfully submit the following comments regarding the Bay-Delta Strategic Workshop to be held on Wednesday, March 19, 2008.

1. The County of San Joaquin commends the State Water Board for taking action to address the Bay-Delta and work towards developing a Strategic Plan Workplan to address the problems which exist within the Bay Delta. However, the State Water Board must develop its Strategic Plan and take action that is consistent with the State Water Board's important role in state water law. Pursuant to state law, the State Water Board is the judge that implements and enforces state water rights and water quality laws, and, as a result, the Board is entrusted by state law to objectively apply, impose and enforce those state water rights and water quality laws. The Board was specifically created by the Legislature to "provide for the orderly and efficient administration of the water resources of the state" exercising "the adjudicatory and regulatory functions of the state in the field of water resources." *Wat. Code* § 174. The County is concerned that the State Water Board continues to carry out these important functions.

The Notice of Public Workshop dated February 27, 2008 ("Notice") for this Workshop provides under the heading "Subject of Workshop" that the purpose of the Workshop is to receive information from representatives of Delta Vision, the Bay-Delta Conservation Plan (BDCP) and CALFED about how the State Water Board's (the State Water Board and the Regional Water Boards) "could best complement or assist in those efforts." It is the County's position that the State Board should not be determining how it can "complement or assist" these independent efforts. Rather, the State Water Board should be seeking input to guarantee that the Delta Vision, BDCP and CALFED are

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moving forward in a manner consistent with State Law in which water rights and water quality laws are properly applied. The State Water Board should not assume that these processes will properly implement state law, rather the State Water Board needs to objectively judge these activities to ensure that state water rights and water quality objectives are being enforced.

Page 2 of the Notice further indicates that a matter for discussion in the Workshop will be comments from Delta Vision, BDCP and CALFED on "how the Water Boards' activities can best complement or add to those of the Delta Vision, BDCP, can CALFED." Again the County would like to caution the State Water Board that the State Water Board cannot assume that the activities of the Delta Vision, the BDCP and CALFED are consistent with State water law; rather the State Water Board's role is to objectively evaluate whether the activities proposed by these entities are consistent with state water law, including the protection of water rights and water quality standards. The State Water Board should be gathering information from these entities to ensure that the Delta Vision, BDCP and CALFED are being developed in a manner that properly implements state water law.

2. Resolution No. 2007-0079 committed to a list of actions which are to be included in the strategic workplan which are attached to the Notice as Attachment A. The third bullet of Attachment A reads ". . . enforce the southern Delta salinity objectives and take other corrective actions (Resolve #3)." The County of San Joaquin applauds the State Water Board to being committed to enforcing the southern Delta Salinity objectives that are established to protect beneficial uses within the Southern Delta, which is located largely within San Joaquin County. However, the County is disappointed that despite the objectives and obligations imposed by Decision 1641 and WR 2006-0006, the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR) have failed to meet the Southern Delta salinity objectives, and the State Water Board has failed to take any enforcement action against these parties. The record is clear that the southern Delta salinity standards were exceeded in 2007 and the State Water Board Staff did not "recommend enforcement action against DWR and USBR for exceeding the salinity objectives at the interior southern Delta compliance locations last spring and summer." (See attached February 19, 2008 letter from Dorothy Rice to John Herrick, South Delta Water Agency). In order to implement Resolve #3 of Resolution No. 2007-0079, the State Water Board must take enforcement action against violators, including DWR and USBR. Here, State Board Staff admits and recognizes the violations of DWR and USBR; however, enforcement is not pursued. The southern Delta salinity standards need to be meaningfully enforced by the State Water Board, against all violators.

3. Attachment B of the Notice includes Actions To Be Evaluated and Further Defined in the Strategic Workshop. Paragraph 1 of Attachment B indicates that the State

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Water Board staff will propose for the State Water Board's consideration "the scope of a basin planning and water right process to review and, as appropriate, amend the southern Delta salinity objectives or their implementation, while ensuring that agricultural uses are protected." The purpose of the southern Delta salinity objective is to protect "beneficial uses." The beneficial uses within the southern Delta that are being protected are agriculture. Thus it is unnecessary to set an objective and also "ensure agricultural uses are protected" because setting the objective is supposed to be for the purpose of protecting the agricultural beneficial uses within the southern Delta. The County supports the State Water Board's efforts to protect agricultural uses within the Delta and that is legally imposed by setting a southern Delta salinity objective that protects the agricultural beneficial uses of the south Delta.

4. Paragraph 4 of Attachment B of the Notice indicates that the State Water Board will consider a proceeding to "Protect public trust resources and balance competing demands for water in and from the Bay-Delta." California state water law does not allow the balancing of competing interests. The "reasonableness" provision of Article X, Section 2 cannot ignore the priority system of California water law, and it cannot eliminate vested water rights. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1250.) Rather, the State Water Board as the judge that implements state water law in California is bound to impose the priority system of state water rights. Shortages are addressed by implementation of the water right priority system. The most senior water rights are protected while junior water rights suffer. This is the foundation of California's water right system and the State Water Board is entrusted, by California law, to implement this water right system. Competing demands for water in and from the Bay-Delta are properly resolved by applying the priority system, not by "balancing." If there is insufficient water in a stream system to support all appropriators, then diversions diminish starting with the most junior appropriators. (*Pleasant Valley Canal Company v. Borror* (1998) 61 Cal.App.4th 742, 770.) The County supports the State Water Board's efforts to address the shortages of water within the Bay-Delta by enforcing the California priority system of water rights and other California water laws, such as the Delta Protection Statute (*Wat. Code* §§ 12200 et seq.), the Watershed Protection Statute (*Wat. Code* §§ 11460 et seq.) and the Area of Origin Statute (*Water Code* §§ 10500 et seq.).

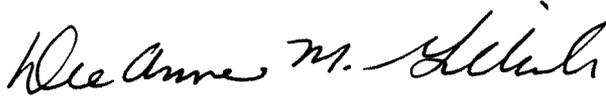
The County of San Joaquin looks forward to participating in the development of the State Water Board's Strategic Plan for the Bay-Delta and is hopeful that the State Water Board,

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by implementing state water law, will guarantee the future of the Bay Delta, including the beneficial uses and water rights within the Bay Delta.

Very truly yours,



DeeAnne M. Gillick  
Attorney at Law

cc: Dr. C. Mel Lytle



# State Water Resources Control Board

Emailed on March 10, 2008 at 11:57 am

FEB 29 2008



Linda S. Adams  
Secretary for  
Environmental Protection

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Arnold Schwarzenegger  
Governor

**FEB 19 2008**

Mr. John Herrick  
South Delta Water Agency  
4255 Pacific Avenue, Suite 2  
Stockton, CA 95207

Dear Mr. Herrick:

## COMPLIANCE WITH SOUTHERN DELTA SALINITY OBJECTIVE

This letter responds to your letter dated December 21, 2007, regarding compliance by the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR) with the salinity objectives at the interior southern Delta compliance locations.<sup>1</sup> You request that I reconsider my decision not to recommend enforcement action against DWR and USBR for exceeding the salinity objectives at the interior southern Delta compliance locations last spring and summer. As you note, my recommendation is not subject to the State Water Resources Control Board's (State Water Board) statutes and regulations governing reconsideration of State Water Board orders or decisions. (Wat. Code, §§ 1120 – 1124; Cal. Code of Regulations, tit. 23, § 768 et seq.)

I will not reconsider my recommendation regarding last year's exceedances. As explained in my correspondence to DWR and USBR, I believe that my recommendation regarding enforcement action last year was appropriate under the circumstances. Any future exceedances will be evaluated on a case-by-case basis to determine whether an enforcement action is appropriate.

Nonetheless, I understand the concerns raised in your letter, and I encourage you to continue to keep me apprised of your concerns in the future. In addition, I encourage you to continue to participate in the State Water Board's review of the interior southern Delta salinity objectives and their implementation. The State Water Board will complete this review as quickly as possible in order to address these recurring issues.

If you have any questions or would like to discuss this matter further, please feel free to contact me at (916) 341-5615 or Diane Riddle, Staff Environmental Scientist, at (916) 341-5297 or Erin Mahaney, Senior Staff Counsel, at (916) 341-5187.

Sincerely,

Dorothy Rice  
Executive Director

<sup>1</sup> The interior southern Delta compliance locations include the San Joaquin River at Brandt Bridge, Old River near Middle River, and Old River at Tracy Road Bridge.

**California Environmental Protection Agency**

Mr. John Herrick

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cc: The Honorable Michael Machado  
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